

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

(1) **OKLAHOMA NATURAL GAS, a
division of ONE GAS, INC.,**

Plaintiff,

v.

(1) **NEXTERA ENERGY
MARKETING, LLC,**

Defendant.

Case No. 21-CV-419-D

ANSWER TO COUNTERCLAIM

Plaintiff Oklahoma Natural Gas, a division of ONE Gas, Inc. (ONG) submits this answer to the *Counterclaim* of Defendant Nextera Energy Marketing, LLC. For each allegation in the *Counterclaim*, ONG recites the allegation and, thereafter, states its answer.

I.

Breach of Contract

1. NextEra and Oklahoma Natural Gas Company, a division of ONE Gas, Inc. (“ONG”) are parties to a natural gas supply contract effective January 31, 2016 (the “Contract”). The Contract was in effect in February 2021.

ANSWER: ONG admits the allegations in paragraph 1.

2. Under the Contract, NextEra agreed to supply natural gas to meet ONG’s needs, and ONG agreed to pay for the natural gas provided in immediately available funds,

on or before the later of the payment date stated in the invoice, or 10 days after ONG's receipt of the invoice.

ANSWER: ONG admits the allegations in paragraph 2. ONG further notes that the allegations in paragraph 2 do not fully describe the terms of the Contract, which speak for themselves and must be construed as a whole.

3. The parties' Contract contemplates the parties will from time to time use oral or written transaction confirmations that may become part of the Contract. In February 2021, there were two transaction confirmations in effect for ONG's purchase of natural gas from NextEra.

ANSWER: ONG admits the allegations in paragraph 3. ONG further notes that the allegations in paragraph 3 do not fully describe the terms of the Contract, which speak for themselves and must be construed as a whole.

4. In February 2021, in accordance with and pursuant to the terms of the Contract, NextEra in good faith purchased natural gas pursuant to ONG's demand for the supply of natural gas, and NextEra supplied ONG with the natural gas ONG sought to supply its customers. On February 12, 2021, Oklahoma's Governor J. Kevin Stitt declared a state of emergency for all 77 Oklahoma counties due to a severe winter storm that caused, among other things, problems related to natural gas including increased demand, commodity acquisition, line pressure, and supply shortages. NextEra timely notified ONG of these issues, and invoked the force majeure provisions of the Contract.

ANSWER: ONG admits that NextEra acquired and provided ONG with natural gas pursuant to the two transaction confirmations referenced in paragraph 3, one on June 3rd, the other on July 29th. ONG further admits that Oklahoma Governor Kevin Stitt declared a state of emergency due to severe winter weather on February 12, 2021. ONG denies the remaining allegations and characterizations in paragraph 4.

5. The Oklahoma Corporation Commission issued an Order on February 16, 2021 directing prioritization of the delivery of natural gas and electricity services necessary for life, health and public safety and directing prioritization of delivery of natural gas to facilities that serve human needs customers.

ANSWER: ONG admits the allegations in paragraph 5.

6. NextEra supplied ONG with natural gas in February 2021 in the knowledge that ONG is a utility that supplies natural gas for such essential services as power generation and residential heating, and to human needs customers. In obtaining natural gas for and delivering it to ONG in February 2021, NextEra relied on ONG's promise to pay NextEra for such natural gas.

ANSWER: ONG lacks sufficient information regarding the facts alleged in paragraph 6 and therefore denies the same.

7. NextEra's efforts to acquire the natural gas it supplied to ONG to meet ONG's demand in February 2021 were commercially reasonable and proper, were in accordance with the parties' course of conduct, complied with industry standards, and complied with the Contract.

ANSWER: ONG lacks sufficient information regarding the facts alleged in paragraph 7 and therefore denies the same.

8. NextEra's allocation of the natural gas it supplied to ONG to meet ONG's demand in February 2021 under the applicable transaction confirmations was commercially reasonable and proper, was in accordance with the parties' course of conduct, complied with industry standards, and complied with the Contract.

ANSWER: ONG denies the facts alleged in paragraph 8.

9. NextEra prepared an invoice for the February 2021 natural gas NextEra purchased for and delivered to ONG, and provided the invoice to ONG, all in accordance with the Contract, the transaction confirmations, the parties' course of dealings, and industry practice.

ANSWER: ONG admits that NextEra provided ONG with an invoice for its February 2021 gas deliveries. ONG denies the remaining allegations and characterizations in paragraph 9.

10. However, although NextEra supplied natural gas to ONG in February 2021, and ONG reaped the benefit of the bargain by accepting the natural gas delivered by NextEra, ONG failed to make full payment to NextEra of the amount due under NextEra's February 2021 invoice as was required by the parties' agreement.

ANSWER: ONG denies the allegations in paragraph 10.

11. Accordingly, ONG is in breach of its contractual obligations to NextEra.

ANSWER: ONG denies the allegations in paragraph 11.

12. Further, ONG is not justified in withholding payment under the Contract, and ONG's failure to make payment does not comply with industry standards or the parties' course of dealing.

ANSWER: ONG denies the allegations in paragraph 12.

13. NextEra has been damaged by ONG's breach, in that NextEra purchased natural gas on the market under force majeure conditions and delivered such natural gas to ONG in the reasonable expectation that ONG would comply with its contractual obligations and pay NextEra for the natural gas ONG received from NextEra, which ONG then consumed or sold to third parties. NextEra has suffered, and continues to suffer, damages and other harm caused by ONG's breach of Contract in its failure to perform its payment obligations.

ANSWER: ONG admits that the February 2021 winter storm did not prevent NextEra from delivering natural gas to ONG under the June 3rd and July 29th transaction confirmations. ONG denies the remaining allegations in paragraph 13.

WHEREFORE, NextEra Energy Marketing, LLC requests the Court determine ONG breached its contractual payment obligation to NextEra, that NextEra has been damaged by ONG's breach in an amount in excess \$75,000, which was withheld from payment by ONG and that NextEra is entitled to recover from ONG pre- and post-judgment interest on NextEra's damages, costs and a reasonable attorney fee, and for such further relief, whether legal or equitable, as would be just and proper.

ANSWER: ONG denies that NextEra is entitled to the relief requested.

II.

Declaratory Judgment

14. NextEra realleges and incorporates each allegation set out in Count I of its Counterclaim, above.

ANSWER: ONG incorporates its answers to the allegations in Count I as set forth above.

15. ONG unilaterally recharacterized NextEra's February 2021 ONG invoice, and decided what it was willing to pay, without regard to the Contract, course of dealing of the parties, or the reliance of NextEra on ONG's promise to pay in fulfilling its obligations under the Contract. NextEra seeks a ruling that ONG is not entitled, under the Contract or otherwise, to unilaterally restructure the parties' agreement and withhold payment for any portion of NextEra's February 2021 invoice outside the narrow framework of the Contract's dispute provision.

ANSWER: ONG denies the allegations in paragraph 15.

WHEREFORE, NextEra Energy Marketing, LLC requests the Court enter a judgment that ONG is not entitled to withhold payment for any portion of NextEra's February 2021 invoice, and for such further relief as would be just and proper.

ANSWER: ONG denies that NextEra is entitled to the relief requested.

III.

Unjust Enrichment

16. NextEra realleges and incorporates each allegation set out in Counts I and II of its Counterclaim, above.

ANSWER: ONG incorporates its answers to the allegations in Counts I and II as set forth above.

17. In February 2021, knowing ONG supplied natural gas to essential services including power generation and residential heating, and for human needs, NextEra in good faith purchased natural gas in reliance on ONG's request for delivery of, and promise to pay for, same, and in reliance on the same NextEra also delivered the natural gas to ONG. ONG accepted delivery with the full knowledge that NextEra had been forced to expend substantial sums for the natural gas it had obtained for and delivered to ONG. However, ONG had no intention of honoring its commitment to pay NextEra for the delivery of natural gas in the manner contemplated by the Contract, the transaction confirmations, the parties' course of conduct, and as required by industry practice.

ANSWER: ONG lacks sufficient information regarding the facts alleged in the first sentence of paragraph 17 and therefore denies the same. ONG denies the remaining allegations in paragraph 17.

18. Having accepted delivery, ONG consumed the natural gas or provided and sold it to its own customers.

ANSWER: ONG admits the allegations in paragraph 18.

19. NextEra paid for the natural gas it supplied to ONG, and ONG received the benefit of that delivery, and was able to consume the natural gas or provide it to its own customers, in return for payment from its customers.

ANSWER: ONG admits the allegations in paragraph 19. ONG further states it paid NextEra all amounts to which NextEra was legally entitled for the benefit conferred.

20. Further, ONG contends it is entitled to, and has sought, relief from regulatory authorities for costs it has incurred attributable to the events and developments of February 2021, but refuses to pay NextEra the amount NextEra is due for the natural gas NextEra provided to ONG in February 2021.

ANSWER: ONG denies the allegations in paragraph 20.

21. ONG has been unjustly enriched by the cost of the natural gas NextEra purchased on behalf of and supplied to ONG in February 2021, in an amount equal to the difference between the amount of NextEra's February 2021 invoice and the sum ONG paid to NextEra, which is an amount in excess of \$75,000.

ANSWER: ONG denies the allegations in paragraph 21.

WHEREFORE, NextEra Energy Marketing, LLC requests that the Court enter judgment determining ONG has been unjustly enriched in an amount equal to the entire sum it withheld, and failed to pay NextEra, but was billed to ONG in and under NextEra's February 2021 invoice, and that NextEra is entitled to an award in the amount of such

unjust enrichment, together with pre- and post-judgment interest, costs, and a reasonable attorney fee, and such other and further relief, whether legal or equitable, as would be just.

ANSWER: ONG denies that NextEra is entitled to the relief requested.

AFFIRMATIVE DEFENSES

1. NextEra's *Counterclaim* fails to state a claim upon which relief can be granted.
2. ONG has fully paid NextEra all amounts to which NextEra is legally entitled.
3. The parties' dispute is governed by a valid, express contract, thus precluding NextEra's unjust enrichment claim.
4. NextEra committed the first material breach of the parties' contract.
5. NextEra's counterclaims are barred under the doctrines of estoppel and waiver.
6. ONG reserves the right to assert further affirmative defenses as they become available through discovery and further investigation.

Dated: 18 June 2021

Respectfully submitted,

s/ Mia Vahlberg

Mia Vahlberg, OBA No. 20357
Justin A. Lollman, OBA No. 32051

GABLEGOTWALS

110 N. Elgin Ave., Suite 200
Tulsa, Oklahoma 74120-1495

Telephone (918) 595-4800

Facsimile (918) 595-4990

mvahlberg@gablelaw.com

jlollman@gablelaw.com

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on 18 June 2021, I electronically transmitted the attached document to the Clerk of Court using the Electronic Case Filing System for filing. Based on the records currently on file in this case, the Clerk of the Court will transmit a Notice of Electronic Filing to those registered participants of the ECF System.

s/ Mia Vahlberg

Mia Vahlberg